

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

**OBJECTION TO LIQUIDATOR'S SUR-REPLY REGARDING
EXPEDITED MOTION FOR STAY OR DECLARATION THAT
SEPTEMBER 22, 2005 ORDER IS STAYED PURSUANT TO RULE 74**

Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, "the ACE Companies"), by their attorneys, Orr & Reno P.A. and Lovells, respectfully submit this objection to the unauthorized Sur-Reply filed by the Liquidator in opposition to the ACE Companies' motion (the "Motion") for an order (a) declaring that the order dated September 22, 2005 (the "September 22 Order") on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents (the "Proposed Agreement") in *In the Matter of the Liquidation of the Home Insurance Company*, Superior Court No. 03-E-0106, is stayed by operation of the mandatory provisions of Rule 74 of the Superior Court Rules pending resolution of the appeal; or (b) in the alternative, staying the September 22 Order, as permitted by Rule 7-A of the Supreme Court Rules and applicable case law.

Summary

1. The Liquidator has once again arrogated to himself the right to file a sur-reply, even though the New Hampshire rules do not provide for sur-replies, the Court did not grant the Liquidator permission to submit a sur-reply, and there was nothing in the ACE Companies' reply papers that warranted another submission on the Motion. Therefore, the ACE Companies' object to the Sur-Reply and respectfully request that the Court disregard it.

2. In the event that the Court accepts the Sur-Reply, the ACE Companies must correct the Liquidator's misreading of the New Hampshire rules and must advise the Court that

the Liquidator has improperly relied on the recent proceedings before the High Court of Justice in England (the “High Court”) relating to the scheme of arrangement (the “Scheme”) contemplated by the Proposed Agreement.

3. As discussed below, Rule 74 applies without exception and there is no provision in the rule for the entry of an order modifying the automatic stay after an appeal has been filed. Furthermore, even assuming that the Court could modify the automatic stay, the Liquidator has not demonstrated any good cause for doing so.

4. In an apparent attempt to influence the Court’s decision on the Motion, the Liquidator also cited in the Sur-Reply (and attached a copy of) the High Court’s recent judgment approving the Scheme (the “Judgment”). The Judgment was expressly limited to the propriety of the Scheme under English law and circumstances before the High Court. The High Court distinguished the Scheme approval from the proceedings before this Court on the Proposed Agreement, and the Liquidator gave a representation to the ACE Companies that the approval would not be used to gain a litigation advantage here. Accordingly, the Court should disregard the Judgment in deciding whether to grant the Motion.

Argument

I. There Is An Automatic Stay Of The September 22 Order Under Rule 74

5. The Liquidator argues that Rule 74 does not apply here because (1) the text of the rule itself does not refer to insurance liquidations, which, he contends, are somehow exempt from the Superior Court Rules; and (2) the September 22 Order was not a “verdict” or “decree.” (See Sur-Reply at ¶¶ 1-2.) Neither argument has any merit.

6. First, Rule 74 is not limited and states that it applies to “all actions at law or in equity.” Super. Ct. R. 74 (emphasis added). It would be absurd to require the rules to refer to each specific area of the law to which they apply. Moreover, this Court has already rejected the Liquidator’s attempt to carve out exceptions to the Superior Court Rules for liquidations. For example, the Liquidator tried to avoid his discovery obligations by arguing that this proceeding “is an in rem action” and that the “usual rules” do not apply. (See Liquidator’s

Objection to Objectors' Requests for Evidentiary Hearing and Liquidator's Motion Concerning Discovery, dated April 2, 2004, at 5 attached hereto as Exhibit 1.) The Court overruled the Liquidator's objection, and the discovery in this case, as well as the hearing on the merits, proceeded in accordance with the Superior Court Rules.

7. Second, the Liquidator has not provided any authority or evidence for his contention that the reference to "verdicts" and "decrees" in Rule 74 means that final orders by the Court (like the September 22 Order) are not stayed upon the filing of an appeal. The filing of an appeal pursuant to Rule 7 of the Supreme Court invokes a stay under Rule 74. *See* Super. Ct. R. 74 (citing Rule 7). Rule 7, in turn, applies to a "decision on the merits" under Rule 3 of the Supreme Court Rules. Rule 3 defines a "decision on the merits" to include an "order, verdict, opinion, decree, or sentence" following a hearing on the merits or a trial on the merits." Sup. Ct. R. 3. It does not distinguish a "verdict" or "decree" on the one hand from an "order" or "opinion" on the other hand. If the stay provisions of Rule 74 were limited to only two types of decisions on the merits (*i.e.*, "verdicts" and "decrees"), that limitation would have been made express. In addition, there is no reason to treat an order or opinion the same as verdict or decree for purposes of Rule 3, yet distinguish between them for purposes of Rule 74.¹

8. The Liquidator also seeks to take advantage of a provision in Rule 74 stating that an order shall be stayed upon the filing of an appeal "unless the Court has otherwise ordered." Super. Ct. R. 74. The use of the past tense makes it clear that the Court's order must precede the filing of an appeal and, in the cases applying Rule 74 cited by the ACE Companies, the order modifying the automatic stay was entered prior to the appeal. The Liquidator has never cited a rule or case allowing the Court to modify the automatic stay post-appeal.

9. The Liquidator claims that there is "no reason why the Court should not have [the] authority" to grant relief from Rule 74 after an appeal has been filed and that Supreme

¹ Rule 7-A of the Supreme Court Rules further supports the notion that the automatic stay provisions of Rule 74 are not limited to "verdicts" and "decrees." It generally refers to motions for a stay of "an order or judgment of a lower tribunal," and the Comment to Rule 7-A points out that the rule provides a mechanism for requesting a stay of the lower court's judgment in the limited circumstances where that judgment "is not stayed by the filing of a timely appeal."

Court Rule 7-A implicitly allows the Superior Court to do so. (Sur-Reply at ¶ 4.) Rule 7-A, however, addresses a completely different matter, which is whether a stay should be issued in cases where “the judgment of a lower tribunal ... is not stayed by the filing of a timely appeal.” (emphasis added.) Thus, Rule 7-A permits the entry of a stay in order to preserve the *status quo* pending appeal. (See *id.*) It does not allow the Court to alter the *status quo*, after an appeal has been filed, by modifying the mandatory stay provisions of Rule 74.

10. The Liquidator ignores this critical distinction and suggests that the Court may grant relief from Rule 74 based on the factors used by courts in deciding injunctions. (See Sur-Reply at ¶ 4.) Even assuming that the Court may modify the automatic stay under Rule 74 after an appeal has been filed (which, as shown above, it cannot), there is no authority for the proposition that the injunctive relief standard applies here.²

11. The Liquidator, moreover, cannot show why the automatic stay under Rule 74 should be lifted. The ACE Companies’ appeal is clearly meritorious and raises several issues of first impression in New Hampshire, including the issue of whether the proposed distributions to the AFIA Cedents could be classified as administrative costs under RSA 402-C:44.³ (See April 29, 2004 Order, at 1; Liquidator’s Response to the Motion to Expedite Appeal, dated May 21, 2004, at 4).

12. At the same time, the maintenance of the stay would not result in any harm to the Liquidator. The AFIA Cedents prosecuted their claims during the pendency of the earlier appeals, and the Liquidator has not demonstrated that the actions of the AFIA Cedents during this appeal would be any different. The Liquidator misconstrues the ACE Companies’

² At the very least, the Court should follow the standard set forth in *Rautenberg v. Munnis*, 107 N.H. 446 (1966), in which the Supreme Court balanced the merits of the appeal against the “delay and inconvenience” to the opposing party. *Id.* at 448.

³ While the interpretation of administrative expenses put forth by the Liquidator is unprecedented in New Hampshire and therefore an issue of first impression, this same interpretation was rejected in Georgia and Illinois. See *In re Coronet Ins. Co.*, 698 N.E.2d 598, 603 (Ill. App. Ct. 1998) (rejecting attempt to transform attorneys’ lien into administrative expense and noting that, under the Illinois insolvency statute, “certain classes” of creditors are not permitted “to place themselves in a superior position”); *Oxendine v. Commissioner of Ins. of N.C.*, 494 S.E.2d 545, 548 (Ct. App. Ga. 1997) (“No reasonable definition of ‘costs’ or ‘expenses’ can include the claims which appellees assert. These claims are for money which appellees claim from [the insured’s] estate and not administrative costs or expenses incurred.”).

reference in their Reply Brief to the expense involved in determining the AFIA Cedents' claims if a stay of the September 22 Order is not entered (*see* Reply Br. at ¶ 17) as an admission that the Proposed Agreement will cause AFIA Cedents to prosecute claims that they would not have prosecuted in the absence of the Proposed Agreement. (*See* Sur-Reply at ¶ 5.) It is nothing of the sort. The "significant resources" referred to by the ACE Companies are the extra expenses caused by the AFIA Cedents' submission of claims that were denied previously or are invalid. The ACE Companies have pointed out several times that the Proposed Agreement improperly encouraged the filing of such barred claims, which otherwise would not have been filed in the normal course.

13. The Liquidator cannot point to the standstill agreement with the AFIA Cedents or the Scheme as reasons for lifting the stay. It is undisputed that the standstill agreement has been extended several times and could be extended again. It is also undisputed that the Scheme is for distribution purposes only, and that there will be no need for any such distribution prior to the determination of the appeal.⁴

14. Thus, even assuming for the purposes of argument that the Court may grant relief from Rule 74 after an appeal has been filed, the balancing of the merits against the lack of harm to the Liquidator demonstrates that the Rule 74 stay must be maintained.

II. The High Court's Recent Order Has No Bearing On The Motion

15. The High Court made it clear that the Judgment is limited in its scope, and emphasized that the Judgment has no bearing on the matters pending in the New Hampshire courts. (*See* Ex. A to Sur-Reply at ¶¶ 15, 22.) In particular, the High Court noted that "it remains an open question" whether there is a stay pursuant to Rule 74. (*Id.* at ¶ 10.)

16. The Liquidator cites the High Court's findings in the Judgment on (a) the potential confusion in the New Hampshire courts as a result of Scheme approval; and (b) the potential for wasted expenditure. (*See* Sur-Reply at ¶ 7.) The High Court, however, stated that

⁴ The Liquidator has conceded that the Scheme will be rendered ineffective upon the Court's confirmation that there is a stay in place under Rule 74.

it was declining to adopt the ACE Companies' argument on confusion because of the sharp distinction it drew between the New Hampshire proceedings on the Proposed Agreement and the English proceedings on the Scheme. (*See* Ex. A to Sur-Reply at ¶¶ 15, 17.) The High Court also noted that the Liquidator had given an undertaking that he would not use the English proceedings for any litigation advantage in New Hampshire. (*See id.* at ¶ 17.) The Liquidator has already violated that undertaking by relying on the Judgment in the Sur-Reply.

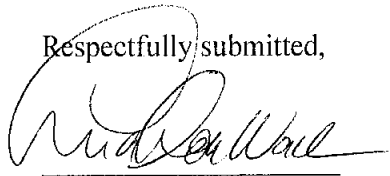
17. Therefore, the ACE Companies respectfully submit that the Court disregard the High Court's Judgment in determining the Motion.

Conclusion

Accordingly, the ACE Companies respectfully request that the Court enter an Order:

- A. Declaring that the September 22 Order is automatically stayed under Rule 74 of the Superior Court Rules;
- B. Or, alternatively, ordering that the September 22 Order is stayed; and
- C. Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,



Lisa Snow Wade
ORR & RENO, Professional Association
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550
Telephone (603) 224-2381
Facsimile (603) 224-2318

-and-

Gary S. Lee
Pieter Van Tol
Dina Z. Gielchinsky
LOVELLS
900 Third Avenue, 16th Floor
New York, New York 10022
Telephone (212) 909-0600
Facsimile (212) 909-0666

Attorneys for Century Indemnity
Company, ACE Property and Casualty
Insurance Company, Pacific Employers
Insurance Company and ACE American
Reinsurance Company

November 14, 2005

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Objection to Liquidator's Sur-Reply Regarding Expedited Motion for Stay or Declaration that September 22, 2005 Order is Stayed Pursuant to Rule 74* has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on November 14, 2005:

J. Christopher Marshall, Esq.
NH Attorney General's Office
Civil Bureau
New Hampshire Department of Justice
33 Capitol St.
Concord, NH 03301-6397

J. David Leslie, Esq.
Eric. A. Smith, Esq.
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Andre Bouffard, Esq.
Downs, Rachlin, Martin, PLLC
199 Main Street
Box 190
Burlington, VT 05402

Eric D. Jones, Esq.
Downs, Rachlin, Martin PLLC
199 Main Street
Box 190
Burlington, VT 05402

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachios & Haley,
PLLP
57 North Main Street
PO Box 1318
Concord, NH 03302-1318

Martin P. Honigberg, Esq.
Sulloway & Hollis, PLLC
9 Capitol Street
P.O. Box 1256
Concord, NH 03302-1256

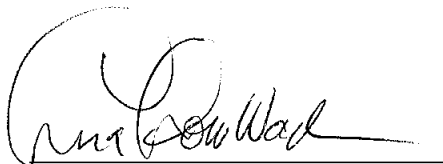
George T. Campbell, Esq.
Robert Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, NH 03302-2159

David Steinberg, Esq.
Clifford Chance LLP
10 Upper Bank Street
Canary Wharf
London E14 5JJ
United Kingdom

Jack B. Gordon, Esq.
Fried Frank Harris Shriver & Jacobson LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505

David M. Spector, Esq.
Dennis G. LaGory, Esq.
Kristy L. Allen, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 6060

Andrew W. Serell, Esq.
Rath, Young and Pignatelli
One Capital Plaza
P.O. Box 1500
Concord, NH 03302-1500



Lisa Snow Wade